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No. 80-568

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CONSOLIDATED RAIL CORPORATION, ET AL., *Petitioners,*

v.

NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC., ET AL., *Respondents.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

SUPPLEMENTAL BRIEF OF NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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December, 1980

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SUPPLEMENTAL BRIEF OF NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents National Association of Recycling Industries, Inc. (NARI), Bergstrom Paper Company, Commercial Metals Co., Frankel Bros. & Co., Inc. and U. S.

Reduction Company submit this supplemental brief in opposition to the railroads' petition for writ of certiorari for two compelling reasons:

1. To respond to the "brief for federal respondents", apparently written by attorneys for the Interstate Commerce Commission[1] and not filed in this case until December 17, 1980 — more than two weeks after the December 1, 1980 deadline fixed by the Clerk of this Court for the filing of said brief, and more than a month after respondents NARI et al. filed their main brief in this case in early November under the applicable rules; and

2. To bring to this Court's attention two recent decisions of the Interstate Commerce Commission under Section 204 of the brand-new Staggers Rail Act of 1980. These two decisions clearly demonstrate why it is so vitally important for this Court to deny certiorari in this case, and thereby put both the Commission and the railroads on notice that they may no longer defy, frustrate and defeat with impunity, the thrice-repeated Congressional mandate for removal of all unlawful, discriminatory, unreasonable transportation rate barriers to maximum industrial recycling in the United States.

PRELIMINARY STATEMENT

When this case was before the court of appeals in 1977-78 (*NARI I*) and again in 1979-80 (*NARI II*), the United States — a statutory respondent under the provisions of 28 U.S.C. 2322, 2342 — appeared on both occa-

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[1] The signature page of said brief indicates it was composed by attorneys for the Commission, and counsel for respondent NARI has been advised said brief was written at the Commission.

sions *in opposition* to both the railroads and the Interstate Commerce Commission. The Department of Justice, which appeared in both instances on behalf of the Department of Energy and the Environmental Protection Agency, explained the "*Interest of the United States*" in this case as follows:[2]

> "In enacting Section 204 of the 4R Act [of 1976] in the same year as the Resource Conservation and Recovery Act, 42 U.S.C. 6901 et seq., Congress expressed its determination that the national interest requires full governmental support for the conservation of our natural resources, our environment, and our energy supplies through the efficient utilization of recycling technology and recyclable products. Specifically, in Section 204, Congress manifested its intent that the Commission, through the exercise of its railroad ratemaking authority, not hinder our recycling industry.
>
> "The 4R Act also directed the Environmental Protection Agency (EPA) to participate in the Commission's Section 204 investigation to insure that the will of Congress would be carried out (*§204(b), 1976 Act*). The EPA submitted its views to the Commission, urging that the facts supported *a strong presumption in favor of a reduction in rates for recyclable products.*
>
> "The Federal Energy Administration [now DOE] also has a strong interest in promoting industrial recycling and in the increased efficiency of industrial use of energy. This interest stems from its general legislative mandate and specifically from section 8(a) of the Energy Supply and Environmental Coordina-

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[2] Brief of United States *NARI I*, D.C. Cir. No. 77-1187, pgs. 3, 4; Brief of United States, *NARI II*, D.C. Cir. No. 79-1393, pg. 3.

tion Act of 1974 (Pub.L. 93-319), which required FEA [now DOE] to conduct and submit to Congress a study including the following:

" '(2) alternative requirements, incentives or disincentives for increasing industrial recycling and resource recovery in order to reduce energy demands, including the economic costs and fuel consumption tradeoff which may be associated with such recycling and resource recovery in lieu of transportation and use of virgin materials; and

" '(3) means for incentives or disincentives to increase efficiency of industrial use of energy.'

"It is the position of the United States, speaking for EPA and FEA [now DOE], that the Commission order under review fails to recognize and comply with the Congressional directive expressed in Section 204 [of the 4R Act of 1976]. . . ."[3]

Unfortunately, the "brief for federal respondents," belatedly filed in these proceedings on December 17, 1980 and apparently written by attorneys for the ICC as aforesaid, totally fails to apprise this Court of any of the positions taken by the Department of Justice, DOE and EPA in the court below in both *NARI I* and *NARI II*, the case at bar. It sets forth exclusively the positions of the ICC — positions that were separately presented by the ICC and soundly rejected by the court of appeals in the proceedings below.

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[3] In its brief in *NARI II*, the Department of Justice, again appearing on behalf of DOE and EPA, "opposed certain aspects of the . . . Commission decision," especially that portion which established a 180% Revenue/Variable Cost Ratio "maximum standard of reasonabless" for rates on recyclables, and which thereupon licensed the railroads to increase rates on all recyclables to that stratospheric ratio level.

This, we respectfully submit, is truly regrettable. The court of appeals acted in response to arguments strenuously presented by three federal agencies in opposition to the arbitrary, capricious course the Commission has pursued throughout this case in violation of the Congressional mandate contained in Section 204 of the 4R Act of 1976. Here, however, this Court must rule on the railroads' petition for certiorari on the basis of a "federal respondents' brief" written by attorneys for the ICC and restricted to the ICC's spurious, previously-rejected views alone.

Ordinarily, this might be understandable to private litigants involved in a certiorari proceeding with federal agency parties possessed of diverse interests. But, not in this case, for the following reasons, *inter alia*:

(i) The position espoused by Justice, DOE and EPA in the court below was in support of a specific statutory mandate of the Congress. ICC, on the other hand, has consistently employed numerous tactics and devices aimed at frustrating and defeating that same Congressional mandate, and so far at least, all of those ICC actions have been flatly rejected by the court of appeals and this Court (*National Association of Recycling Industries, Inc.* v. *ICC* (*NARI I*), 585 F.2d 522 (1978), *cert. denied*, 440 U.S. 929 (1979); *National Association of Recycling Industries, Inc.* v. *ICC* (*NARI II*), CCA, D.C., No. 79-1393 (1980)):

(ii) The ICC's deep-rooted, total hostility to rate relief and rate reductions for recyclables is documented by court decisions dating back to 1973 (*United States* v. *S.C.R.A.P.* (*SCRAP I*), 412 U.S. 669 (1973); *Aberdeen & Rockfish R. Co.* v. *S.C.R.A.P.* (*SCRAP II*), 422 U.S. 289 (1975); *NARI I*, *supra*; *NARI II*, *supra*).

(iii) During the *SCRAP I* and *SCRAP II* cases, the ICC represented to the courts that it would *voluntarily* conduct a special, broad investigation into the lawfulness of freight rates for recyclables, but it thereafter steadfastly refused to do so, making it necessary for Congress to enact the 1973, 1976 and 1980 statutory mandates involved in this case (see *NARI I, supra*, at 585 F.2d 527).

(iv) The ICC strenuously lobbied against each of those statutory mandates when they were before the Congress, and attempted to defeat same (see *NARI I, supra*, at 585 F.2d 527).

(v) When Congress passed its *first* statutory mandate in 1973 (Regional Rail Reorganization Act, §603, Pub.L. 93-236, 49 U.S.C. 10710), the ICC "virtually ignored" it (see *NARI I, supra*, at 585 F.2d 531, 532).

(vi) The ICC thereafter violated, and has so far completely frustrated, the statutory mandate contained in the *second* statute (Railroad Revitalization and Regulatory Reform Act of 1976, §204, Pub.L. 94-210) Congress enacted to require the *removal* of all unlawful, unreasonable, discriminatory freight rates for recyclables (*NARI I, supra, NARI II, supra*).

(vii) Now, while this case is still pending before this Court, the Commission has already taken two actions which threaten *effectively to repeal* the recently-enacted Section 204 of the Rail Act of 1980 — Congress' *third* statutory mandate — before this Court can even rule on the railroads' pending petition for certiorari with reference to the second statutory mandate (see *Appendix A-D* hereto).

With that kind of officially-documented track record, we respectfully submit the ICC is poorly qualified to file what purports to be a "federal

respondents' brief" in this case. Patently, its positions and interests are diametrically opposite from those of the other federal agencies mentioned above which appeared throughout the proceedings before the court of appeals to support and obtain the enforcement of the very Congressional mandates the ICC is obviously bent on violating and destroying.

Respondents NARI, et al. therefore, believe it exceedingly unfair and misleading in this particular instance for a brief, apparently written by or on behalf of the ICC alone, to suggest, allegedly on behalf of all "federal respondents" involved in this case, that the court of appeals' judgment herein should be summarily reversed. As the court of appeals ruled when it refused to stay that judgment —[4]

> ". . . the rate increases involved, which we have ordered vacated, were made in violation of our previous decision. The authority of a court extends to vacating actions taken in violation of a court's orders. To grant the requested stay would be to nullify our own decisions, now twice taken."

Those court of appeals' decisions, of course, were rendered, in major part at least, in response to pleas made by the Department of Justice on behalf of DOE and EPA. It is thus impossible to surmise, and "federal respondents' brief" herein does *not* seek to claim, that DOE AND EPA now suddenly want those decisions summarily reversed and nullified.

We thus urge the Court to treat "federal respondents' brief" in this case for what it really is — another ICC-sponsored document aimed at frustrating

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[4] Appendix F to petition for certiorari.

and defeating the Congressional mandates contained in Section 204 of the 4R Act of 1976 and Section 204 of the Rail Act of 1980.

I. Federal Respondents' Brief, However, Nevertheless Concedes, As It Must, That The Court Of Appeals Correctly Enjoined The Staggering Series Of Special Rate Increases Piled On Recyclables Pursuant To the ICC's Decision Of April 16, 1979 In *Ex Parte 319*, If The Court Entertained Substantial Doubt About The Consistency Of The Commission's Decision And Those Rate Increases With The Commission's Mandate From Congress Under Section 204 Of the 4R Act Of 1976.

It was nevertheless impossible for even the ICC to avoid conceding in "federal respondents' brief" in this case that the court of appeals obviously had the inherent judicial power as a reviewing court, to enjoin the oppressive series of special rate increases piled on recyclables, as authorized by the Commission's decision of April 16, 1979 in *Ex Parte 319*, if the court of appeals had doubts about the consistency of the Commission's decision, and those ensuing special rate increases, with the Commission's mandate from Congress under Section 204 of the 4R Act of 1976.

Thus, "federal respondents' brief" herein quotes directly from this Court's opinion in *Acthison, T. & S.F. Ry.* v. *Wichita Board of Trade*, 412 U.S. 800, 822 (1973), and flatly concedes, at page 11:

> "But an injunction [against the rate increase itself] . . . would be warranted only if the reviewing court entertained substantial doubt about the consistency of the Commission's action with its mandate from Congress."

Indeed, as this Court knows, it was emphasized throughout the opinion in *Wichita Board of Trade* that "it is the *duty* of a reviewing court" to require that both the ICC's actions, and those taken by the railroads in response to the ICC's rulings, be wholly "consistent with [the Commission's] mandate from Congress" (412 U.S. 806, 809, 822).

But, of course, that is precisely why the court of appeals ordered the special rate increases in this case to be vacated — *it found those rate increases, based on the Commission's decision of April 16, 1979 in Ex Parte 319, to be totally inconsistent with the Congressional mandate for the removal of all such unlawful rates and rate increases on recyclables found in Section 204 of the 4R Act of 1976 (49 U.S.C. 10731)*. Thus, the court of appeals specifically ruled:[5]

> "The clear Congressional intent behind Section 204 was to remove barriers to increased levels of recycling, if such barriers should be found to exist. Now that the Commission has found unjust discrimination against recyclables, it would surely be ironic for this finding to result in an increase in the rates and 'barriers' for such materials. . . .
>
> "Where railroads have already 'remedied' discrimination by increasing recyclable rates, however, these increases must be revoked *as inconsistent with the extent of the Commission's authority to remedy discrimination under Section 204*." [Italics supplied.].

Plainly, therefore, the court of appeals found that both the Commission's decision of April 16, 1979 in *Ex Parte 319* and the railroads' special rate increases

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[5] Pet. App., pgs. 23c, 24c.

predicated thereon were inconsistent with the Congressional mandate of Section 204. The court of appeals thus correctly ordered those special rate increases to be vacated pending further action by the Commission which would be consistent with the Congressional mandate of the governing statute.

Federal respondents' brief, therefore, correctly concludes that the court of appeals' judgment does *not* warrant plenary review by this Court. It is patently erroneous and capricious, however, to the extent it nevertheless baselessly suggests that this Court should summarily reverse that judgment, in total contravention of applicable law contained in this Court's decision in *Wichita Board of Trade, supra.*

II. The Interstate Commerce Commission Has Already Embarked On An Unlawful Course Designed To Repeal, By Administrative Fiat, The Brand-New Congressional Mandate For Reduction Of Rates On Recyclables Contained In Section 204 Of The Rail Act Of 1980. Thus, It Is Imperative For This Court To Deny Certiorari In This Case So That The Unlawful Special Rate Increases Vacated By The Court Of Appeals May Be Removed Under Section 204 Of The 1976 Act, While All Necessary Actions Are Taken To Enforce The New Congressional Mandate For Additional Rate Reductions Contained In the 1980 Act

Federal respondents' brief seeks to create the false impression that the ICC is hard at work enforcing the new Congressional mandate for sweeping rate reductions on all recyclables, other than scrap iron and steel, found in Section 204 of the Staggers Rail Act of 1980, which

the President signed into law on October 14, 1980. The ICC's obvious purpose, of course, is to mislead this Court into erroneously concluding that perhaps the court of appeals' judgment in this case is no longer essential to shippers of recyclables, who are on the verge of obtaining all necessary rate relief from the Commission itself under the new 1980 statute.

Unfortunately, nothing could be further from the truth. Section 204 of the Rail Act of 1980, of course, requires the railroads *to reduce*, by January 14, 1981, their rates on all recyclables, other than scrap iron and steel, to a Revenue/Variable Cost Ratio "cap" level carefully defined by Congress in that section of the new law. The Commission's sole functions under Section 204 are to compute the "cap" defined by Congress, and to enforce compliance therewith by the railroads.

On November 19, 1980, however, the Commission erroneously computed the new "cap" at a ratio level of 150%, whereas, properly computed, it should be approximately 142% — and by a split decision of 4 to 2, it tentatively advised the railroads that, under the majority's interpretation of the new statute, *no rate reductions will be required* irrespective of the extent to which Revenue/Variable Cost Ratios for existing rates on recyclables actually exceed the new "cap" ratio level (see *Appendix A* hereto).

As indicated, two of the six ICC Commissioners strenuously objected, stating the majority's "*suggestion that the railroads need take no action to reduce rates on recyclables clearly violates Congressional intent*" (*Appendix A* hereto).[6]

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[6] The arbitrary, capricious nature of the Commission's majority ruling is obvious. Under Section 204(a)(3) of the 4R Act of 1976,

The author of Section 204 of the Rail Act of 1980, Chairman Long of the Senate Surface Transportation Subcommittee, sent a vigorous written protest to the Commission which is on file in the public record (*Appendix B* hereto).

Chairman Florio and the ranking Republican member of the House Subcommittee on Transportation and Commerce — the two principal House conferees on the Rail Act of 1980 — likewise filed a written protest with the Commission (*Appendix C* hereto).

On December 12, 1980, however, with those strenuous written Congressional protests from the House and Senate managers of the Rail Act of 1980 before it, the arbitrary, capicious Commission went even further to repeal Section 204 in its decision in *Ex Parte 386 — Increased Freight Rates And Charges, Nationwide, 1981* (*Appendix D* hereto). Whereas it tentatively ruled on November 19, 1980 that Section 204 of the 1980 statute *did not require the railroads to make immediate reductions in rates for recyclables in excess of the new statutory "cap," as ordered by Congress, but that such reductions might be attained over a long period of time by excluding such recyclables from further rate increases* (*Appendix A* hereto) *— it proceeded to rule, on December 12 in Ex Parte 386, that all recyclables nevertheless would have to bear the new 5% rate increase sought by the railroads, irrespective of whether their cur-*

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the Commission is obliged to *remove* any rate which is "*unreasonable*," i.e., *in excess of the "maximum standard of reasonableness"* now established by Congress under Section 204 of the Rail Act of 1980. Moreover, when the Commission itself established the *180% "maximum standard of reasonableness"* in this case, it ordered the railroads "*to reduce*" all rates on recyclables to that 180% "cap" level (Pet. App., pgs. 21d, 25d).

rent rates are already in excess of the new statutory cap to be set under Section 204 (Appendix D hereto). The outrageous Commission simply stated (*Apendix D*):

> "We see nothing in the Staggers Act of 1980 to require [even] suspension."

Thus, in a period of less than two months after Congress enacted Section 204 of the Rail Act of 1980, the Commission has attempted effectively to repeal that law by administrative fiat, as follows:

1. On November 19, 1980, it ruled that Section 204 does *not* require any *rate reductions* for recyclables, irrespective of how excessive the current rates may be; and
2. On December 12, 1980, it ruled that *further rate increases may be imposed on recyclables*, irrespective of how excessive the current rates may be.

Thus Chairman Long of the Senate Committee was clearly correct when he chastised the ICC for its patently illegal actions, stating (*Appendix B*):

> "The Commission's proposed majority ruling in this case threatens *to repeal*, by administrative fiat, the specific initial *rate reduction* requirement of the statute, and it is thereby inconsistent with the Congressional intent of Section 204. . . .
>
> "When my proposal, which became Section 204 of the 1980 Act, became law, I felt certain it would finally bring the long litigation over freight rates for recyclables to a prompt, fair conclusion. Congress dropped scrap iron and steel from Section 204 because the railroads contended rate reductions on those commodities would result in lost revenues that would be too significant. They agreed, however, to absorb the revenue losses involved in reducing and maintaining rates on all other recyclables at the new "cap" level.

> "The Commission should not prolong this lengthy battle at this point by misconstruing the clear Congressional intent that rates on recyclables be reduced under Section 204."

This recalcitrant record of unrelenting Commission hostility to the Congressional mandates contained in Section 204 of the 4R Act of 1976 and Section 204 of the Rail Act of 1980 underscores the vital necessity for denial of certiorari in this case and for prompt enforcement of the court of appeals' revocation order.

The Commission and the railroads must be made to understand that they are not a mightier force than Congress and the Courts combined.

III. Even Assuming The Commission Is Finally Compelled To Obey The Congressional Mandate Of Section 204 Of The Rail Act Of 1980, The Court Of Appeals' Revocation Order In This Case Is Still Vitally Necessary, And It Should Be Made Fully Enforceable Through Denial Of Certiorari In These Proceedings

The railroads' reply brief in this case misstates and misrepresents the true, correct Revenue/Variable Cost Ratios for rates on recyclables established by the ICC's decision of April 16, 1979 in *Ex Parte 319* — the Commission proceeding which was before the court of appeals for review in this litigation, and which is now before this Court.[7]

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[7] In their reply brief, the railroads improperly present a series of ratios they themselves computed, entirely *ex parte* and without any opportunity for cross-examination, in a completely different general revenue proceeding (*Ex Parte 375*) (see Railroads' Reply Brief, pgs. 7, 8). In fact, the railroads concede in their reply brief that the *Ex Parte 375* ratios which they present "cannot be used

The Revenue/Variable Cost Ratios for recyclables set forth in the ICC's decision of April 16, 1979 in this case are as follows:[8]

Recyclable Commodities	Revenue/Var. Cost Ratios R.R. Territories		
	East	South	West
Aluminum residues.	231%	210%	171%
Aluminum scrap.	175%	178%	156%
Miscellaneous nonferrous residues.	262%	—	168%
Ashes.	311%	114%	162%
Copper matte, etc..	187%	—	210%
Copper, brass scrap.	189%	199%	209%
Lead, zinc scrap.	184%	218%	150%
Paper waste.	129%	163%	145%
Textile waste.	124%	104%	167%
Textile wiping cloths.	136%	146%	152%
Cullet.	189%	229%	184%
Rubber scrap.	119%	163%	145%
Reclaimed rubber.	183%	168%	176%
Petroleum waste .	232%	166%	165%

The Court will note that, *as of April 16, 1979*, when the ICC rendered its decision in the remand proceedings

accurately to compare ratios for virgin and recyclable commodities" (see Railroads' Reply Brief, pg. 7, ftnt. 9). Those ratios are also completely *dehors* the record in this case, and thus they should be ignored by the Court.

[8] See Pet. App. to petition for certiorari, pgs. 13d, 17d, 22d, 24d, 26d, 29d, 31d, 32d.

in this case, the Revenue/Variable Cost Ratios for rates on almost all these recyclables were, in one or more railroad territories, already substantially *in excess* of the statutory "cap" or maximum standard of reasonableness now prescribed by Section 204 of the Rail Act of 1980, whether that "cap" ultimately be set at the correct ratio of *142%* or at the Commission's proposed "cap" of *150%* (see *Appendix A* hereto).

But, *since April 16, 1979*, the railroads have piled *on top of those ratios* all the *special rate increases* on recyclables set forth in Appendix II to respondent NARI's main brief in this case, *plus* the 5% general rate increase just authorized by the ICC in *Ex Parte 386, supra. In some cases, those post-April 16, 1979 rate increases have totaled approximately 50% in the short period of less than a year and a half.*

Those are the rate increases, of course, which the court of appeals revoked because plainly they grossly exacerbate and increase the existing illegality in the base rate structures for recyclables, as of April 16, 1979, the date of the Commission's decision-on-remand in this case. They were revoked because they operated to increase the existing rate illegality before the court of appeals could require the ICC effectively to remedy the existing unlawfulness, in line with the Congressional mandate of Section 204 of the 4R Act of 1976.

Thus, even assuming the ICC is ultimately compelled to enforce Section 204 of the 1980 Act in the manner prescribed by Congress, this Court should still deny certiorari in this case and enable the court of appeals to enforce its revocation order against the post-April 16, 1979 special rate increases maliciously heaped on recyclables throughout the nation, in pursuit of the Commission's unlawful April 16, 1979 decision-on-remand, which were vacated by the court of appeals, as aforesaid.

Those illegal, post-April 16, 1979 rate increases must be *removed first, under Section 204 of the 4R Act of 1976. Then, the unlawful base rate ratios originally developed by the Commission in its decision of April 16, 1979 from the voluminous evidence before the ICC in this case, must be rolled* back, reduced and thereafter maintained at or below the new ratio "cap" ultimately correctly established under Section 204 of the Rail Act of 1980.

Anything short of this will simply enable the ICC capriciously to continue to deny any and all rate relief to shippers of recyclables, in complete violation of the aforesaid Congressional mandates, through the interjection of another series of dilatory procedural tactics or erroneous substantive rulings.

CONCLUSION

For all the reasons stated in our main brief and this supplemental brief, it is respectfully submitted that the Court should deny the petition for writ of certiorari in this case.

Respectfully submitted,

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APPENDIX A

APPENDIX A

Federal Register/Vol. 45, No. 225/Wednesday, November 19, 1980/Notices 76551[Ex Parte No. 394]

Cost Ratio for Recyclables; 1980 Determination

AGENCY:Interstate Commerce Commission.

Action: Notice of institution of proceeding.

SUMMARY: Section 204 of the Staggers Rail Act of 1980, Pub.L. 96-448, requires rail carriers to maintain rates for the transportation of recyclable materials, other than scrap iron and steel, at revenue-to-variable cost ratio levels equal to or less than a described average revenue-to-variable cost ratio. The Commission has calculated this average cost ratio to be 150%.

DATES: Comments should be filed by December 9, 1980.

ADDRESSES: An original and 15 copies, if possible, of any comments should be sent to: Room 5340, Interstate Commerce Commission, Washington, D.C. 20423.

FOR FURTHER INFORMATION CONTACT: Richard B. Felder or Jane F. Mackall (202) 275-7656.

SUPPLEMENTARY INFORMATION: Section 204 of the Staggers Act of 1980 requires rail carriers to reduce and maintain rates for the transportation of recyclable materials, other than recyclable or recycled iron or steel, at revenue-to-variable cost ratio levels that are equal to or less than the average revenue-to-variable cost ratio that rail carriers would be required to realize, under honest, economical, and efficient management, in order to cover total operating expenses, including depreciation and obsolescence, plus a reasonable and economic profit or return [or both] on capital employed in the business sufficient to attract and retain capital in amounts adequate to provide a sound transportation system in the United States. The carriers are required to take all necessary actions within 90 days of October 1, 1980, the effective date of the Staggers Act.

Although section 204 does not specifically direct the Commission to develop this average ratio, it does state that the Commission shall have jurisdiction to issue all orders necessary to enforce the requirements of the section. The legislative history also indicates that Congress intended the Commission to establish the standard, H.R. Rep. No. 96-1430, 96th Cong. 2d Sess. 96 [1980]; S.Rep.No. 96-470, 96th Cong., 1st Sess. 18-19, 33-34, 51, 61-62 [1979]. We anticipate periodic recalculations of the average ratio.

As discussed in detail below, we have developed the ratio using regional applications of Rail Form A for the year 1977. We expect to base future average ratios upon the Unified Rail Costing System. However, after considering the short time period available for the calculation of this first ratio, and the fact that the new accounting system is not yet fully operational, we have used Rail Form A applications for the latest year available.

Calculation of the Average Ratio

The proposed revenue-to-variable cost ratio was developed in the following manner. Using regional applications of Rail Form A for the year 1977, the total fully allocated costs, that is, total variable costs plus total constant costs including the allowance for cost of capital at the embedded debt rate, were added to produce the total costs for the United States. The allowance for costs of capital at the embedded debt rate was removed to produce total operations expenses, rents, and taxes.

The current cost of capital was calculated by applying, to the net investment in transportation property, the composite cost of capital rate of 11.22 percent increased to a pre-tax figure of 18.12 percent using the statutory tax rate. The 11.22 percent rate was developed in Ex Parte No. 381, *Adequacy of Railroad Revenue (1980 Determination)*, decision served.

The current cost of capital was added to the total operating expenses, rents, and taxes to produce the total freight revenues which, after deducting operating expenses, rents, taxes, and federal income taxes would provide the included railroads with the proper cost of capital or fair return

as found by the Commission in Ex Parte No. 381. The total freight revenues were then divided by the total variable costs, including the cost of capital at the embedded debt rate, to determine the average revenue-cost ratio which all traffic must produce to provide the proper cost of capital or fair return for the railroads.

Rate Reductions under Section 204 We also request comments concerning rate reduction requirements under the Staggers Act. Section 204 requires the railroads, within 90 days, to take all actions necessary to "reduce and thereafter maintain" rates for recyclables, other than scrap iron and steel, at cost ratio levels equal to or less than the defined average ratio. This wording implies that the carriers are to reduce immediatly any above average recyclable rates.

However, section 204 goes on to state that as long as a rate exceeds the average cost ratio, the rate cannot be increased. This suggests that rates do not have to be decreased immediately. This interpretation is supported by the Joint Explanatory Statement of the Committee of Conference which states the bill would prohibit increases for rates which are currently above the threshold until such time as the rate falls below the average revenue-to-variable cost threshold.

Because of the legislative history, we are inclined toward the interpretation that immediate reductions are not required. However, we invite the public to comment upon the question.

We do not expect that the proceeding will significantly affect either the quality of the human environment or conservation of energy resources. However, comments on these issues are welcom.

Authority: 49 U.S.C. 10731(e).

Dated: November 10, 1980.

By the Commission, Chairman Gaskins, Vice Chairman Gresham, Commissioners Clapp, Trantum, Alexis, and Gilliam. Chairman Gaskins concurring with a separate expression. Commission Gilliam dissenting in part with a separate

expression. Commissioner Clapp rejecting and dissenting with a separate expression.

Agatha L. Mergenovich,

Secretary.

Chairman Gaskins, concurring:

Section 10731(e) is internally inconsistent and cannot be reconciled to give all of its provisions a fair meaning. At the same time, it speaks of rate reductions, it speaks of rates continuing to exceed the average revenue-to-variable cost ratio level. The Conference Report strongly supports the majority position that railroads can avoid enormous burden of making reductions on all their recyclable rates in excess of the prescribed ratio level. Given the level of inflation, moreover, this question will quickly become moot. Any suggestion that our action "clearly violates" Congressional intent is without foundation.

Commissioner Gilliam, dissenting in part:

I find no Congressional intent to support the suggestion of the majority that railroads need to take no action to reduce rates on recyclables. The statute clearly states that necessary reductions must be made within 90 days. I do, however, agree with Commissioner Clapp that Congress allowed flexibility in making individual rate reductions for practical reasons. The railroads are still required to make the necessary reductions on an average basis within 90 days.

Commissioner Clapp, dissenting:

The suggestion that the railroads need take no action to reduce rates on recyclables clearly violates Congressional intent. I believe that the language which the majority claims is inconsistent merely evinces an awareness that railroads initially may have to make full rate reductions on an average commodity basis. If all carriers were to try to determine individual revenue to variable cost realtionships on each and every particular rate, the physical burden would be enormous. Congress seems to contemplate a more practical two part ap-

proach. The railroads are to make any needed reductions on an average basis within 90 days. This may mean that some rates will exceed the average; these individual rates can only be increased thereafter to the extent that our revenue to variable cost threshold percentage exceeds the actual relationship for a particular movement.

[FR Doc.80-36057 Filed 11-18-80; 8:45 am]

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APPENDIX B

APPENDIX B

UNITED STATES SENATE
COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION
WASHINGTON, D.C. 20510

December 2, 1980

Honorable Darius W. Gaskins
Chairman
Interstate Commerce Commission
12th & Consitution Avenue, N.W.
Washington, D.C. 20423

Re: Ex Parte 394 — Cost Ratio for Recyclables, 1980 Determination

Dear Mr. Chairman:

As the original author of Section 204 of the Staggers Rail Act of 1980, entitled "Transportation of Recyclable Materials," and one who actively participated in all of the recent conference procedures regarding that section of the Act, I want to register the strongest possible objection to the manner in which the Commission has misinterpreted the requirements and Congressional intent of Section 204 in its preliminary majority ruling in this proceeding, which was published in the Federal Register for November 19, 1980.

Frankly, I find it impossible to understand how four of the six Commissioners, who found that the new "cap" on freight rates for recyclable materials should be set at the 150% Revenue/Variable Cost Ratio level, could also simultaneously be "inclined toward the interpretation that immediate reductions are *not* required" under Section 204 in cases where rates for recyclables are clearly in excess of that 150% "cap," or whatever cap the Commission finally properly adopts in this case.

In this regard, Commissioners Clapp and Gilliam, who dissented from that propsed ruling, are plainly correct. As they state in their dissenting opinions, there is "no Congressional intent to support the suggestion of the majority that

railroads need to take no action to reduce rates on recyclables" now. The majority's suggestion "violates the Congressional intent" clearly set forth in Section 204, because Section 204, which I introduced and supported throughout the Congressional proceedings on the Rail Act of 1980, patently "states that necessary reductions must be made within 90 days."

I want to add the following additional observations to those presented by the dissenting Commissioners:

1. Section 204 of the Rail Act of 1980 specifically states that—

> Notwithstanding any other provision of this title or any other law, within 90 days after the effective date of the Staggers Rail Act of 1980, all rail carriers . . . shall take all actions necessary to *reduce* and thereafter maintain rates for the transportation of recyclable or recycled materials at the revenue-to-variable cost ratio level . . . (Underscoring supplied.)

The Commission's proposed majority ruling in this case threatens *to repeal*, by administrative fiat, the specific initial *rate reduction* requirement of the statute, and is thereby inconsistent with the Congressional intent of Section 204.

2. When the Commission itself set a 180% "cap" on rates for recyclables in its decision of April 16, 1979 in the *Ex Parte 319* case, it ordered that rates on recyclables that produce ratios in excess of 180% "*must be reduced.*" How and why should the need for immediate "*reduction*" to the lower 150% level be any different?

In this regard, Senate Report 96-470 issued in support of Section 204 of the 1980 Act states —

> The Committee's provision is quite simple: it merely reduces the Commission's cap on recyclables from the 180% revenue/ variable cost level to the ratio cost level established (by Section 204.)

3. The language — "As long as any such rate equals or exceeds such revenue-to-variable cost ratio can established by the Commission, such rate shall not be required to bear any further rate increase" — was included in Section 204 of the 1980 Act to prevent any *rate increases* on recyclables during periods which intervene each year between the Commission's *annual* establishment of "cap" and actions taken by the railroads actually "*to reduce*" rates to the new annual "cap" level in situations where the "cap" may be reduced.

For example, I understand this year the railroads are proposing a new 5% general rate increase on recyclables before they are required by Section 204 to reduce their existing rates to the new cap level in early January. Under Section 204, as passed by Congress, such rate increases are prohibited because the railroads have not yet reduced rates for recyclables in excess of the new "cap" to or below the "cap" level. In other words, the railroads must, by January 14, 1981, *reduce* rates on recyclables to the new "cap" level under Section 204. In the meantime, because those rates are still above the "cap" level, they cannot be increased.

When my proposal, which became Section 204 of the 1980 Act, became law, I felt certain it would finally bring the long litigation over freight rates for recyclables to a prompt, fair conclusion. Congress dropped scrap iron and steel from Section 204 because the railroads contended rate reductions on those commodities would result in lost revenues that would be too significant. They agreed, however, to absorb the revenue losses involved in reducing and maintaining rates on all other recyclables at the new "cap" level.

The Commission should not prolong this lengthy battle at this point by misconstruing the clear Congressional intent that rates on recyclables be reduced under Section 204.

Maximum industrial recycling will benefit the United States in areas of energy conservation, resource conservation, solid waste disposal and balance of payments.

I hope the Commission will remove its proposed interpretive roadblock to what Congress clearly sought to accomplish here.

Sincerely,

/s/ RUSSELL B. LONG
Russell B. Long, *Chairman*
Surface Transportation Subcommittee

RBL:whjg

APPENDIX C

APPENDIX C

CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
SUBCOMMITTEE ON TRANSPORTATION AND COMMERCE
OF THE
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE
WASHINGTON, D.C. 20515

December 3, 1980

The Honorable Darius W. Gaskins
Chairman
Interstate Commerce Commission
12th and Constitution Avenue, N.W.
Washington, D.C. 20423

Dear Chairman Gaskins:

As you know we were active leaders of the House conferees when the Staggers Rail Act of 1980 was in conference between the House and the Senate last September, and thus we are familiar with the purpose and intent of the actions taken by the Conference Committee.

With this background, we have reviewed the Commission's contemplated initial decision under Section 204 of the Act, entitled "Transportation Of Recyclable Materials", which appeared in the Federal Register for November 19, 1980.

We are concerned with the Commission's interpretation of Section 204, which we accepted in conference with the Senate. Section 204, as the House conferees accepted it, clearly requires the railroads, within 90 days after the Act became effective (October 14, 1980), "to *reduce* and thereafter maintain rates for the transportation of recyclable or recycled materials, other than recyclable or recycled iron or steel", at the new Revenue-To-Variable Cost ratio level prescribed by the Commission.

When the conferees excluded scrap iron and steel from Section 204, this removed the significant revenue loss feature

of the recycling provision. It was understood, as Section 204 provides, that railroads would have to first reduce and thereafter maintain, rates on all other recyclable materials at or below the level to be established by the Commission annually.

Our Subcommittee on Transportation and Commerce also has jurisdiction over the Resource Conservation and Recovery Act of 1976 and the Solid Waste Disposal Act. Under those statutes, Congress has attempted to ensure that all appropriate federal actions be taken to promote maximum industrial recycling in the United States. We believe recycling is important, and agreed to this provision of the Senate bill.

We urge the Commission to reexamine its proposed interpretation in light of Section 204 to ensure that rates for recyclables comply with that section.

With kindest regards, we are,

Sincerely,

EDWARD R. MADIGAN
Edward R. Madigan,
Ranking Minority
Subcommittee on
Transportation
and Commerce

JAMES J. FLORIO, CHAIRMAN
James J. Florio, Chairman
Subcommittee on
Transportation and
Commerce

APPENDIX D

APPENDIX D

INTERSTATE COMMERCE COMMISSION

DECISION

Ex Parte No. 386

INCREASED FREIGHT RATES AND CHARGES — NATIONWIDE — 1981

Decided December 12, 1980

Service Date December 16, 1980

By Special Permission Order No. 81-0001 we authorized the nation's railroads to publish and file a proposed 5-percent general rate increase, subject to protest and possible suspension. Pursuant to this authorization the railroads filed on October 11, 1980 master tariff[1] X-386 with an effective date of December 31, 1980, and an expiration date of December 31, 1982. Protests to the proposed tariff were subsequently filed and the railroads replied.

After reviewing the carriers' justification and the issues raised in the protests, we conclude that the proposed 5-percent increase can be permitted to become effective. We will investigate the increases proposed for recyclables, other than scrap iron or steel, subject to refunds as provided by 49 U.S.C. 10707(d).

2. *Recyclables.* Various protestants seek suspension and investigation of the rate increase for recyclables. We decline to suspend but will order an investigation for recyclables other than scrap iron and steel.

In *National Association of Recycling Industries, Inc.* v. *Interstate Commerce Commission*, No. 79-1393 (D.C. Cir., decided April 25, 1980, as clarified August 15, 1980),[5] the

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[5] Remanding for further consideration the Commision's decision in Ex Parte No. 319, *Investigation of Freight Rates for the Transportation of Recyclables or Recycled Commodities*, 361 I.C.C. 238 (1979), 361 I.C.C. 641, (1979) and 361 I.C.C. 856 (1979).

court specifically permitted the application to recyclables of those general rate increases which apply uniformly to all commodities.

We see nothing in the Staggers Act of 1980 to require suspension. However, Section 204 renders appropriate an investigation of recyclables other than scrap iron and steel. Section 204 calls for a revenue-to-variable cost ratio to be used as the measure of maximum reasonable rates for recyclables other than scrap iron and steel. This ratio or "cap" must be determined within 90 days of the effective date of the Act or by December 30, 1980.[6] The proposed increase will become effective on December 31, 1980, one day after the date set by Congress for implementation of Section 204. Thus, it is possible that the "cap" on recyclables determined in compliance with Section 204 may bar from application to recyclables, except scrap and steel, general increases approved for these commodities. Faced with this situation along with the need to compare the schedule C data submitted on recyclables with ratios previously considered in Ex Parte No. 319, *supra*, we find an investigation necessary. Suspension is unnecessary since shippers will be protected by the refund provisions of 49 U.S.C. 10707(d). As Section 204 does not apply to scrap iron and steel, we are basing our decision not to investigate the increase on these commodities on the court decisions cited above.

3. *Supplemental Environmental Evaluation.* The railroads presented the required supplemental environmental evaluation pursuant to 49 C.F.R. 1108 in the form we accepted in Ex Parte No. 368, *Increased Freight Rates and Charges-Nationwide 1979*, 362 I.C.C. 153 (1979). No increases in energy requirements, natural resources consumption, or

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[6] On November 18, 1980, we instituted Ex Parte No. 394, *Cost Ratios For Recyclables-1980 Determination*, and requested comments on 150 percent as the Section 204 norm, among other matters.

discernible diversion to alternative modes of transportation are anticipated. Inflationary forces which have resulted in increased costs for the rail industry have similarly affected alternative transportation industries. Accordingly, we find that this decision will not significantly affect either the quality of the human environment or conservation of energy resources.

We find:

The general rate increase proposed in Tariff X-386 may be placed in effect, except to the extent noted above.